Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-205 OF 1995
GOPAL SRI RAM, NH CHAN AND MAHADEV SHANKAR JJCA
8 OCTOBER 1997

Civil Procedure *— Summary judgment — Delay in application for summary judgment — Whether delay alone can form basis of dismissal of application — Rules of the High Court 1980 O 14*

The respondent had instituted proceedings against the appellants. The writ was issued on 11 August 1993 to which the appellants entered an appearance and delivered their defence. On 23 February 1994, the respondent took out a summons for summary judgment. The learned judge granted the appellants conditional leave to defend. The appellants appealed against the order on the ground that the respondent had been guilty of delay in applying for summary judgment.

Held, dismissing the appeal:

(1) (Per **Gopal Sri Ram JCA**) There is nothing to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. In this case, as the judge was of the opinion that the issues raised by the appellants were a sham, he would have been entitled to enter judgment for the respondent. However, in the exercise of discretion, he had decided to grant conditional leave. If the trial judge erred in granting conditional leave instead of judgment for the respondent, the error was one that prejudiced the respondent, not the appellants. The present case therefore did not warrant appellate interference (see pp 821D, I and 822A); *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and *McLardy v Slateum* (1890) 24 QBD 504 followed.

(2) (Per **NH Chan JCA**) An application for leave to sign judgment under O 14 r 1 of the Rules of the High Court 1980 need not necessarily be made before the defendant has delivered his defence. A defendant may show cause by 'affidavit or otherwise' and the term 'or otherwise' allows the defendant to do so by delivering a defence. Therefore, delay in applying for O 14 is no ground for defeating the plaintiff's right to summary judgment under O 14 when there is no real defence disclosed (see p 822E, F, G); *McLardy v Slateum* (1890) 24 QBD 504, *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98, *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 and *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 followed; *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267 not followed.

A [Bahasa Malaysia summary

Penentang telah memulakan prosiding terhadap perayu-perayu. Writ dikeluarkan pada 11 Ogos 1993 yang mana perayu-perayu telah memasukkan kehadiran dan menyampaikan pembelaan. Pada 23 Februari 1994, penentang mengambil saman untuk penghakiman terus. Hakim yang arif memberikan kebenaran bersyarat kepada perayu-perayu untuk membela. Perayu-perayu merayu terhadap perintah itu atas alasan bahawa penentang bersalah atas kelewatan dalam memohon untuk penghakiman terus.

Diputuskan, menolak rayuan:

(1) (Oleh **Gopal Sri Ram HMR**) Tiada apa-apa untuk mencadangkan bahawa suatu permohonan untuk penghakiman terus boleh ditewaskan semata-matanya atas alasan bahawa terdapat kelewatan dalam permohonan kepada mahkamah. Dalam kes ini, oleh kerana hakim berpendapat bahawa isu-isu yang dibangkitkan oleh perayu-perayu adalah palsu, beliau berhak memasukkan penghakiman untuk penentang. Namun demikian, dalam pelaksanaan budi bicara, beliau telah memutuskan untuk memberi kebenaran bersyarat. Sekiranya hakim perbicaraan terkhilaf dalam memberikan kebenaran bersyarat dan bukannya penghakiman untuk penentang, kesilapan adalah sesuatu yang memudaratkan penentang, bukan perayu-perayu. Maka, kes ini tidak memerlukan gangguan kuasa rayuan (lihat ms 821D, I dan 822A); *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 dan *McLardy v Slateum* (1890) 24 QBD 504 diikut.

(2) (Oleh **NH Chan HMR**) Suatu permohonan untuk kebenaran bagi memperolehi penghakiman di bawah A 14 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak semestinya perlu dibuat sebelum defendan menyampaikan pembelaannya. Seseorang defendan boleh menunjukkan sebab melalui 'afidavit atau selainnya' dan terma 'atau selainnya' membenarkan defendan untuk berbuat demikian dengan menyampaikan suatu pembelaan. Maka, kelewatan dalam memohon untuk A 14 bukan suatu alasan untuk menewaskan hak plaintif untuk penghakiman terus di bawah A 14 sekiranya tiada pembelaan yang sebenarnya telah didedahkan (lihat ms 822E, F, G); *McLardy v Slateum* (1890) 24 QBD 504, *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98, *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 dan *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 diikut; *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267 tidak diikut.]

Notes

For cases on delay in application for summary judgment, see 2 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3298–3309.

Cases referred to

Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining

Co Ltd [1969] 2 MLJ 98 (folld)
Jacobs v Booth's Distillery Co (1901) 85 LT 262 (folld)
Krishnamurthy & Anor v Malayan Finance Corp Bhd [1986] 2 MLJ 134 (folld)
McLardy v Slateum (1890) 24 QBD 504 (folld)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi [1978] 2 MLJ 267 (not folld)

Legislation referred to

Rules of the High Court O 14 r 1

Appeal from: Civil Suit No 22–295 of 1993 (High Court, Pulau Pinang)

K Balasundaram (*Peter Miranda* with him) (*Peter Miranda & Co*) for the appellants.
Conrad Young (*Azman, Davidson & Co*) for the respondent.

Gopal Sri Ram JCA: The first appellant before us (first defendant in the court below) entered into a time charter with the respondent (plaintiff in the court below). The time charterparty was in respect of a vessel known as the 'MV Mreznica' and was for a period of three months and fifteen days commencing 11 August 1988. The charter payable was US$4,500 per day. The first appellant then nominated the second appellant (second defendant in the court below) to have the use of the vessel under the aforesaid time charter. However, the first appellant undertook to be answerable for all acts of default occasioned by the second appellant under the time charter. Later, the respondent furnished an account of all sums due under the contract contained in the time charter. There was default in payment and the respondent therefore instituted proceedings against both appellants to recover the sum of US$155,239.80.

The writ was issued on 11 August 1993. The appellants entered an appearance to the writ. They then delivered their defence on 29 September 1993. On 23 February 1994, the respondent took out a summons for judgment under O 14 of the Rules of the High Court 1980 ('the RHC'). The appellants resisted the summons on a number of grounds. The grounds advanced included an argument that the respondent had been guilty of inordinate and unexplained delay in moving the court for summary judgment. Accordingly, the appellants argued that they should have unconditional leave to defend the action. The learned judge who heard the summons came to the conclusion that the issues raised by the appellants were not bona fide triable. He nevertheless granted the appellants leave to defend upon the condition that the appellants shall pay to the respondent's solicitors a sum in Malaysian Ringgit equivalent to US$155,239.80 to be held by the said solicitors in an interest bearing account until further order. Against this order, the appellants appealed to this court.

Two grounds were advanced in support of the appeal. First, it was argued that the wrong plaintiff had brought the action. Second, that the respondent had been guilty of delay in applying for summary judgment. We rejected both arguments and dismissed the appeal.

There is absolutely no merit in the argument that the respondent was the wrong plaintiff. The respondent was a party to the time charter in question. It was therefore entitled to bring the action.

In support of the delay argument, the appellants relied upon the decision of this court in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281. It was submitted by counsel that that case is authority for the proposition that a plaintiff's summons for summary judgment may be defeated solely upon the ground of delay in making the application. With respect, we are unable to accede to the submission made by counsel for the appellants.

In *Ng Hee Thoong*, this court reversed the High Court and granted leave to defend principally on the ground that the issue whether a valid demand had been made of the defendants in that case was plainly arguable. This court also took into account the fact that the plaintiff in that case had remained inactive for more than a year and then moved for summary judgment without giving notice of intention to proceed under the relevant provision of the RHC. When properly understood, there is nothing in *Ng Hee Thoong*'s case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O 14 where there are no bona fide triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

In our judgment, authority that is plainly against the appellants concludes the point taken by counsel. We have in mind, of course, the judgment of Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98. His Lordship, in granting a summons for judgment taken out about three months after appearance had been entered to the writ, applied the following passage in the judgment of Baron Pollock in *McLardy v Slateum* (1890) 24 QBD 504 at p 506:

> The view taken by other judges, and by the masters, is that the intention of O 14 r 1 was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O 14 right and proper. We think that this is the proper construction of the rule ... *Although the primary intention of the rule may be that an application should be made before defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory.* Therefore, our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O 14 r 1 because a defence has been delivered ... If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case. (Emphasis added.)

In his judgment, the judge came to the conclusion that the issues raised by the appellants were a sham. He said that they were not bona fide triable issues. In those circumstances, he would have been entitled to enter judgment for the respondent. However, in the exercise of discretion, he decided to grant conditional leave. If he erred, the error was one that

prejudiced the respondent, not the appellants. The present instance is therefore not a case that warrants appellate interference.

For these reasons we came to the conclusion that the appellants should fail. The appeal was dismissed and orders made that are usually consequent upon a dismissal.

NH Chan JCA: I agree completely with my lord Gopal Sri Ram JCA that the appeal should be dismissed for the reasons which he has so ably put in his unexceptionable judgment. I wish only to say a few words in support of and to amplify on what my lord has said.

In *McLardy v Slateum* (1890) 24 QBD 504, Pollock B held at p 506 that:

> Although the primary intention of the rule [O 14 r 1] may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore, our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O 14 r 1 because a defence has been delivered.

An application for leave to sign judgment under O 14 r 1 need not necessarily be made before the defendant has delivered his defence. In *McLardy v Slateum*, the plaintiff was successful in obtaining judgment under O 14 a month after the defence was served. But, if a defence has been served, it may be sufficient to enable a defendant to get leave to defend. See O 14 r 4(1) which reads:

> A defendant may show cause against an application under rule 1 by affidavit *or otherwise* to the satisfaction of the Court. (Emphasis added.)

A defendant may show cause by 'affidavit or otherwise' and the term 'or otherwise' allows the defendant to do so by delivering a defence. But leave to defend the action will not be granted by the court if the defence is a sham or it discloses no real defence. The court has to be satisfied that there is a triable issue or question or that there ought to be a trial. See *The Supreme Court Practice* (1997) Vol 1 at p 157 para 14/3–4/3.

Delay in applying for O 14 is no ground for defeating the plaintiff's right to summary judgment under O 14 when there is no real defence disclosed. 'If the plaintiff is precluded from the application for summary judgment, it would only mean unnecessary prolongment [sic — I think the word is 'prolongation'] of the case, resulting in a waste of time and added expense for the defendant company', said Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 at p 100. He then referred to this passage by Halsbury LC in *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 (HL):

> ... There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it had not been in aid of justice that such things should continue, O 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

A I regret to have to say that the dictum of Pollock B had been given unnecessary and excessive prominence by the late Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at p 268, where he said thus:

> The writ in these proceedings was issued on 8 July 1977, and served on
B 29 July on the defendants who filed their defence and counterclaim on 12 August raising several points of defence and counterclaim, but the plaintiffs only took out their application for summary judgment for the full amount of their claim on 16 August. In *McLardy v Slateum* (1890) 24 QBD 504, the Divisional Court held that, though it was the intention of the rules that the application should be made before a defence had been delivered in ordinary
C course, the plaintiff was not precluded from making it afterwards, *but that in such an event the onus is cast on the plaintiff of showing why he did not apply sooner.* The plaintiffs in this case have not discharged this onus and indeed counsel appearing for them admitted this to be so. (Emphasis added.)

And this is what Pollock B actually said in *McLardy v Slateum* at pp 506,
D 507:

> If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

There is nothing in the wording of O 14 r 1 to warrant such a construction.
E In fact, in that case, there was no explanation given by the plaintiff for the delay in applying for O 14, yet, he succeeded in obtaining judgment under the rule.

The dictum was given added credibility when it was approved by Salleh Abas LP in the Supreme Court case of *Krishnamurthy & Anor v*
F *Malayan Finance Corp Bhd* [1986] 2 MLJ 134 where he said (at p 135):

> ... the law as to the time when an application for an O 14 judgment should be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence *provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court,*
G *no O 14 judgment could be signed.* This is the ratio decidendi in *McLardy v Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267. (Emphasis added.)

H Fortunately, the words of the former Lord President were only dicta as 'no defence was ever filed by the appellants and other defendants' (at p 135) in that case, and the plaintiff (respondent) was successful in obtaining summary judgment against the appellants (defendants) whose appeals were dismissed by the Supreme Court.

I *Appeal dismissed.*

Reported by David Lai